(2)

SUPREME COURT NO.: 97-53

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When a creditor violates the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, can the consumer raise his statutorily created right to rescind as a defense to the creditor's foreclosure suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort, or can the creditor escape the consequences of a §1635 rescission when he sues to foreclose the mortgage after §1635(f)'s 3 year limit expires on the theory that the right to rescind is a statutorily created right that expires after 3 years as held by Florida's Supreme Court?

PARTIES TO THE PROCEEDINGS

The Petitioners, DAVID R. BEACH and LINDA M. BEACH, his wife, are natural persons who resided in the property subject to this TIL claim, at 5870 Set N Sun Jupiter, Florida on June 22, 1981. The Beaches were Defendants in the state Circuit Court foreclosure suit, Appellants before the 4th District Court of Appeals and the Petitioners before the Florida Supreme Court. The only interested parties are those parties to this litigation and the state court as follows:

The Respondent, GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, doing business in Palm Beach County, Florida, the Plaintiff in the state Circuit Court action, the Appellee before the 4th District Court of Appeals, and Respondent before the Florida Supreme Court.

There are no other parties to this action under FED. R. APP. PRO. 26.1 except as follows:

1. James A. Bonfiglio, attorney for Petitioners.
2. Broad and Cassel, 400 Australian Ave. S., Fifth Floor, W. Palm Beach, FL 33401, Law Firm for Respondent Great Western Bank.
3. Hon. John W. Dell, 4th District Court Judge
4. Steven Ellison, Esq., Broad and Cassel, 400 Australian Ave. S., Fifth Floor, West Palm Beach, FL, attorney for Respondent
5. Great Western Bank, Respondent/Appellee
6. Hon. Barbara Pariente, 4th District Court Judge
7. Hon. Thomas E. Sholts, Judge 15th Judicial Circuit

8. Hon. Martha C. Warner, 4th District Court Judge

9. Hon. Gerald J. Kogan, Florida Supreme Court, Chief Justice

10. Hon. Harry Lee Anstead, Florida Supreme Court, Justice

11. Hon. Stephen H. Grimes, Florida Supreme Court, Justice

12. Hon. Major B. Harding, Florida Supreme Court, Justice

13. Hon. Ben F. Overton, Florida Supreme Court, Justice

14. Hon. Leander J. Shaw, Florida Supreme Court, Justice

15. Hon. Charles T. Wells, Florida Supreme Court, Justice

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Buford v. American Fin. Co.,
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Distribution Services Ltd. v. Eddie
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Equity Plus Consumer Fin. & Mtge.
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Ford Motor Credit Co. v. Milhollin,
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Helvering v. New York Trust, 54 S.Ct. 806
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Heulett v. John Blue, 344 So.2d 505
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In Re Celona, 90 B.R. 104
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In Re Porter, 961 F.2d 1066
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OTHER AUTHORITY CITED

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1972 Annual Report to Congress on 20,21
TILA by the Board of Governors
of the Federal Reserve System

December 1972 Report of the National 20,21
Commission on Consumer Finance

Black's Law Dictionary, 6th Ed. 17,18

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SUPREME COURT NO.:

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DAVID R. BEACH and LINDA M. BEACH, his wife,

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GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

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Petition for Writ of Certiorari to the Supreme Court State of Florida

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On February 13, 1997, the Florida Supreme Court for the State of Florida issued its opinion which was published at 22 Florida Law Weekly S71 (February 13, 1997) affirming the decision of the 4th District Court of Appeals, which was published at Beach v. Great Western Bank, 670 So.2d 986 (Fla. 4 DCA 1996). Petitioners attach a full copy of the opinions in the Appendix Volume I to their Petition. The Florida Supreme Court denied the Beach's timely Motion for Rehearing on April 26, 1997 and the mandate has issued.

STATEMENT OF JURISDICTION

Petitioners seek review of the February 13, 1997 opinion of the Supreme Court for the State of Florida and it's judgement made final when the Court denied the Petitioner's timely February 21, 1997 Motion for Rehearing. The judgment affirmed the 4th District Court's opinion which held §1635(f) acted as a statute of repose to bar a consumer's claim for rescission after 3 years expired when the consumer raised the claim by recoupment as a defense to the creditor's suit to foreclose its mortgage.

The Florida Supreme Court ruled on the interpretation and application of the Truth in Lending Act and had discretionary jurisdiction to review the 4th District Court of Appeal's decision that passed on and certified the question as a question of great public importance. see Art.V §3(b)(3), Fla.Const.; Fla.R.App.Pro. 9.030(a)(2)(A)(v). This Court has jurisdiction under 28 U.S.C. 1254(1) and Rule 10(b) Rules of the Supreme Court.

PREFACE-ABBREVIATIONS USED

Petitioners will use the following abbreviations in the brief;

TIL ..... 15 U.S.C. 1601, et.seq., Federal Truth In Lending Act

§1601 ..... Specific section of 15 U.S.C. 1601, et.seq.,

TIL ..... Pre-1980 15 U.S.C. 1601, et seq.

new TIL ..... TILA after the Simplification and Reform Act of 1980

FRB ..... The Federal Reserve Board

Reg Z ..... 12 C.F.R. 226.01,

O.S.C ..... Official Staff Commentary to Reg. Z issued by the FRB

APR ..... Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC ..... Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF ..... Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF ..... Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

Petitioner will refer to DAVID R. BEACH and LINDA M. BEACH, his wife, Petitioners, as "the Beaches" and GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, as "GW".

STATUTE INVOLVED

§ 1635. Right of rescission as to certain transactions

(a) **Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) **Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such

interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) **Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) **Modification and waiver of rights**

The Board may, if it finds that such action is necessary in order

to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) **Exempted transactions; reapplication of provisions**

This section does not apply to--

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) **Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the

provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

STATEMENT OF FACTS AND CASE

The Beaches owed a vacant lot at 5870 Set N Sun Jupiter, Fla. On June 22, 1981 they built a home with a Fidelity construction loan then refinanced Fidelity's loan through GW. The Beaches closed on the GW refinance on August 15, 1986. GW furnished the Beaches with closing documents including a 3 day notice of right to cancel and TIL disclosure statement that contained material errors which gave the Beaches the extended right to rescind under §1635 and the right to damages under §1640(a).

GW sued to foreclose the mortgage more than 3 years from the 1986 closing. The Beaches answered and raised TIL §1635 rescission and §1640(a) damages as an affirmative defense. The matter went to trial and resulted in a finding that GW made material disclosure errors; the loan was not subject to §1635 rescission; and even if rescission was appropriate, the §1635(f) limit expired.

Florida's Fourth District Court of Appeal in a divided opinion held the Beach's loan was subject to rescission, but the Beaches could not rescind to defend GW's foreclosure after the §1635(f) 3 year limit expired. The panel certified the question to the Florida Supreme Court. Florida's Supreme Court affirmed finding §1635(f)'s 3 year limit for rescission a statute of repose which barred the Beach's defense in recoupment after the 3 year limit expired.

The Petitioners now seek Certiorari Review.

SUMMARY OF ARGUMENT

Florida's Supreme Court is the only state or federal appellate court to refuse to allow a consumer to raise the extended right to rescind as a defense in recoupment after the §1635(f) 3 year limit expires. The unanimous state appellate opinions allow time barred rescission as a defense in recoupment under §1635(f). This Court and the Federal Circuit Courts unanimously agree that a defendant can raise all federal statutory claims, including TIL claims, after the limit expires as a defense in recoupment.

The decision directly and expressly conflicts with the long standing and unanimous opinions from this Court, other Circuit Courts and the highest appellate courts of other states that refuse to distinguish between a common law and a statutory federal cause of action for defensive recoupment after the statute of limitation to bring the claim expires.

This Court should accept jurisdiction to create harmony with this Court's decisions, the Federal Circuits and state appellate Courts on the subject.

REASONS FOR GRANTING THE WRIT

Congress passed TILA to remedy divergent and often fraudulent practices in disclosing the true cost of consumer credit, assure a meaningful disclosure of credit terms, facilitate comparison credit shopping and balance the lending scales, thought to be weighted in favor of lenders. §1601(a), H.R.Rep.No.1040, 90th Cong. 2d Sess. 7,13 (1968), Mourning v. Family Publications Services Inc., 93 S.Ct. 1652,1657-1660, 411 U.S.356, 363-368, 36 L.Ed.2d 318 (1973), Ford Motor Credit Co. v. Milhollin, 100 S.Ct. 790,794, 444 U.S. 555,559-560, 63 L.Ed.2d 22 (1980), Anderson Bros. Ford v. Valencia, 101 S.Ct. 2266,2274, 452 U.S. 205,219-220, 68 L.Ed.2d 783 (1981).

Congress created a private attorney generals system to enforce TIL by giving consumers the right to damages for TIL errors and right to rescind certain loans regardless of the technical nature of the error. §1640(a), §1635(a)&(b), Sosa v. Fite, 498 F.2d 114, 121 (5th Cir. 1974), Williams v. Public Finance Co., 598 F.2d 349, 355-358,fn.9 (5th Cir.1979), Parker v. DeKalb Chrysler Plymouth, 673 F.2d 1178,1181 (11th Cir.1982).

Courts expansively and broadly apply and interpret the §1635 right to rescind because it is remedial while narrowly interpreting exceptions to the right. Sellers v. Wollman, 510 F.2d 119,122 (5th Cir.1975), Buford v. American Fin. Co., 333 F.Supp. 1243,1247 (N.D. Ga.1971), Equity Plus Consumer Fin. & Mtge. Co. v. Howes, 861 P.2d 214,217 (1993), In Re Celona, 90 B.R. 104,112 (Bkr. E.D.Pa.1988), aff'd 98 B.R. 705 (D.C. E.D.Pa. 1990).

Reiter v. Cooper, 113 S.Ct 1213,1218 507 U.S. 258, 122 L.Ed2

604(1993) affirmed the Court's long standing principal announced in Bull v. United States, 295 U.S. 247,262 55 S.Ct. 695,700 79 L.Ed. 1421 (1935) and again in United States v. Western Pacific R. Co., 352 U.S.59,71 77 S.Ct.161,169, 1 L.Ed.2d 126 (1956): recoupment is available in the context of all federally created rights including TIL. Reiter embraced recoupment for TIL by citing In Re Smith, 737 F.2d 1549,1554 (11th Cir.1984), a TIL case where recoupment would be available had the consumer brought a proper recoupment claim.

Florida's Supreme Court distinguished the unanimous opinions from other states that allowed post 3 year §1635 claims as defenses in recoupment by holding the 5 other cases and 15 judges wrongly assumed Congress created §1635(f)[1974]'s 3 years as a statute of limitation not a statute of repose. Beach 22 Fla.L.WK. S71,72 fn 7 (Fla.1997) refused to follow Dawe v. Merchant's Mortgage & Trust Corp., 683 P.2d 796 (Colo. 1984)-5 justices, Federal Deposit Ins. Corp. v Ablin, 532 N.E. 2d 379 (Ill.App.Ct.1988)-3 judge panel, Community National Bank & Trust Company v. McClammy 525 N.Y. S.2d 629 (N.Y.App.Div. 1988)-4 judge panel, In Re Shaw, 178 B.R.380 (Bkr.N.J. 1994) & In Re Botelho, 195 B.R. 558 (Bkr.Mass.1996)-1 judge each [The district judge recently affirmed Botelho in an unreported opinion].

Beach adopted the Federal definition for a statute of repose, identical to Florida under WRH Mortgage, Inc. v. Butler, 684 So.2d 325,327 (Fla. 5 DCA 1997):

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the

> commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created and the limitation of the remedy is a limitation of the right." Beach p. 73.

Beach's analysis of §1635(f) as a statute that creates and limits rights which did not exist at common law like a statute of repose conflicts with unanimous Federal Circuit opinions embodied by James v. Home Const. Co. of Mobile Inc., 621 F.2d 727,728 (5th Cir. 1980). Beach conflicts with James's holding that §1635(f) was a statute of limitations not a statute that limited a substantive statutorily created right. James rejects this Beach holding in scathing language:

> "We see no reason to continue to abide by obsolete judicial dicta which have little relevancy to contemporary thought."

James adopted this Court's principals announced in Bull, and Western Pacific, re-affirmed in Reiter. All refuse to distinguish between a statute of limitation and statute of repose for defensive recoupment. No common law right existed to collect tax refunds, the issue in Bull p. 700. This Court refused to distinguish the right to the refund based on the statutorily created right/statute of repose doctrine Id., p.700:

> "An action will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness is immaterial....A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction."Id.

No right to recover damages under 49 U.S.C. §10701(a) for the difference between a tariff rate and the reasonable rate existed at

common law for Reiter. Under §11706(c)(2) shippers must begin the §11705(b)(3) action within two years of delivery by the carrier. §11706(g). Congress statutorily created a right which did not exist at common law and placed a 2 year limit to recover. Id. 1217-1218. Beach would reject Reiter's defensive claims because the claims meet the statute of repose definition under both Federal and State law. Beach conflicts with Reiter's holding that a Plaintiff cannot wait for a time limit to run then sue to avoid the time barred claim that would offset the debt, even if the claim is created by statute. Id. p.1218. This Court adopted the Beach rejected concept of defensive rescission past §1635(f)'s 3 years in Reiter:

> "Courts of Appeals have understood [United States v. Western Pacific R. Co., 352 U.S.59, 71, 77 S.Ct. 161,169 (1956)] as expressing not just a narrow holding based on the United States set-off statute, but a general principal of recoupment applicable in other contexts. See Distribution Services Ltd. v. Eddie Parker Interests, Inc., 897 F.2d 811,813 (CA5 1990); in re Smith, 737 F.2d 1549, 1554 (CA11 1984); 118 East 60th Owners Inc. v. Bonner Properties, Inc., 677 F.2d 200,203 (CA 1982); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 549, n.3 (CA2 1963). Id. p. 1218.

Beach conflicts with Matter of Coxson 43 F.3d 189,193-194 (5th Cir. 1995) and In Re Smith, p.1554, both TIL cases. Beach conflicts with Distribution Services Ltd. v. Eddie Parker Ints. Inc., 897 F.2d 811,812 (5th Cir.1990) which allowed a COGSA claim defensively after 46 U.S.C.1303(6)'s limitation expired. Eddie Parker, p.813-814 rejected the cases that held COGSA's time limit extinguishes the action itself not the remedy, an express conflict with Beach's repose reasoning. COGSA's limitation meets Beach's Federal and State definitions for a statute of repose. Beach presents direct conflict with Coxson, In Re Smith and Eddie Parker.

Beach conflicts with Silverman v. Eastrich Multiple Investor Fund L.P., 51 F.3d 28,31-33 (3rd Cir.1995). The 3rd Circuit allowed a defendant to raise his ECOA claim after the limit expired, even though ECOA claims never existed at common law, are rights created wholly by statute and meet the Beach state and federal definition for a statute of repose. Beach conflicts with: Crossett Lumber Co. v. United States, 87 F.2d 930 (8th Cir.1937) [recoupment of tax refund allowed after the limit expired even though right to tax refund statutorily created right that did not exist at common law]; Pennsylvania R.Co. v Miller 124 F.2d 160 (5th Cir.1942) [recoupment of refund for damage to shipped goods under ICC allowed after the limit expired although right to damages statutorily created right that did not exist at common law]; Luckenbach S.S. Co. v. United States, 312 F.2d 545,549 n.3 (2nd Cir.1963) [recoupment allowed for 46 U.S.C.§745 Federal Admiralty Suit after the limit expired though the right did not exist at common law]; 118 East 60th Owners Inc. v. Bonner Properties, Inc., 677 F.2d 200,203 (CA 1982) [recoupment allowed under Federal Declaratory Relief Act, although right to declaratory relief did not exist at common law].

Reiter embraced James and Bull, repudiating Beach's holding that defendants cannot raise a repose-barred claim as a defense. Reiter refused to distinguish between statutorily created Federal rights and common law rights for post limit defensive recoupment. Federal tax laws, federal tariffs, ICC bills of lading and COGSA claims all meet the Beach statute of repose definition. Congress created a new liability for taxes, tariffs, ICC bills of lading and

COGSA claims, gave parties actions to enforce the rights unknown at common law and fixed the time to bring the actions. IRS tax laws, the right to recover tariffs, ICC bills of lading, and COGSA claims are all creations of statute unknown at common law. Commencement of a tax, tariff, ICC, and COGSA action within the time fixed in the statute is an indispensable condition of liability and the action which it permits. The time element for a tax refund, tariffs, ICC bills of lading, and COGSA suits are inherent elements of the right so created and the limit on the remedy is a limit of each right.

Reiter rejects Beach's holding that would allow a Plaintiff to wait for the tax, tariff, ICC bills of lading, or COGSA statutes of repose to run, then sue to avoid the compulsory counter claim that would offset the debt. Reiter, p.1218 embraced defensive post-limit §1635 rescission by adopting in re Smith in the broader rule for federal claims. Four U.S. Supreme Court principles emerge from Bull and Reiter that Beach rejected: 1) Federal defensive recoupment is not as narrow as Beach, but is extremely broad to cover statutes of limitation and repose; 2) Reiter p.1218 adopted recoupment for all statutes of repose including Smith's application of recoupment for TIL; 3) Reiter adopted Smith after Congress amended §1640(e) and so rejected Beach's statutory interpretation of §1640(e) as compared to §1635(f) for Federal Law; and, 4) Reiter by adopting Smith after Congress amended §1640(e), embraced Smith's 3 prong test for TIL claims after §1635's 3 years expires.

Beach's statute of repose holding conflicts with every federal case to analyze whether defendants can raise statutorily created

federal rights after the limit expires regardless of whether the federal statute meets the definition of a statute of repose. Not one case from Bull to Reiter to 118 East 60th distinguishes between statutory created federal rights, statutes of repose or rights at common law for recoupment.

All 3 prongs of Smith's p. 1552 test, adopted in Reiter, apply to a foreclosure and a §1635 defense: 1) the TIL violation and the debt arose from the same loan transaction; 2) the defendant asserts the §1635 claim as a defense; 3) the creditor's claim is timely. Federal Law from Bull to Reiter conflict with Beach's artificial distinction between statutorily created Federal rights terminated by repose and common law rights. Federal Law allows time barred recoupment even though all of the time barred Federal claims meet Beach's definition of a statute of repose. Beach conflicts with this Court and unanimous Federal Circuit Court opinions that allow time barred Federal Statutory claims by recoupment after a limit expires regardless of whether a statute of repose or limitation bars the claim, including §1635(f).

Beach also conflicts with the unanimous state court opinions on the subject. Dawe is the first state Supreme Court reported opinion to allow rescission after §1635(f)'s limit expired. Ablin, McClammy, Westbank v. Maurer 658 N.E.2d 1381 (App.Ill.1995), Shaw and Botelho all adopted Dawe. The state opinions unanimously allow post limit TIL rescission. Beach conflicts with the reported opinions from the highest state court in Colorado and intermediate appellate opinions from New York and Illinois.

Beach held Congress' §1635(f) particular language made it a statute of repose. Beach, [and likely GW in its argument] overlooks the fact every federal and state case which adopts the statutorily created right or statute of repose doctrine does so in the context of an affirmative suit to recover on the time barred claim. see Eddie Parker p.813-814. Beach is the only case to apply the repose doctrine to bar the claims defensively by recoupment.

Every case analyzes §1635(f) as a statute of limitation not a statute of repose. Beach's portrayal of §1635(f) as a statute of repose conflicts with James p.728-729. Even the opinions that bar post-3 year affirmative suits call §1635(f) a statute of limitation not a statute of repose, creating conflict between Beach and more Federal Circuit cases: King v. State of Cal. 784 F.2d 910,914 (9th Cir.1986) [Congress did not intend to prolong limitations period]; Rudisell v. Fifth Third Bank, 622 F.2d 243,246-248 (6th Cir.1980), Moore v. Travelers Ins. Co., 784 F.2d 632,633 (5th Cir.1986), Felt v. Fed. Land Bank Ass'n, 760 F.2d 209,210 (8th Cir.1985).

Beach ignored the fact that the Beaches did not sue or bring an action to enforce the right to rescind while repose bars the action, not the defense. Beach's statute of repose definition does not apply to a defendant because the defendant does not bring a cause of action when he alleges recoupment. The lack of a cause of action is the critical and missing component for Beach's recoupment analysis under state and federal statute of repose definitions.

A defense is not an action. **Black's Law Dictionary**, 6th Ed.: p.28 Action; "in its usual legal sense means a lawsuit brought in

a court": p.419 Defense; that which is offered and alleged by the party preceded against in an action or suit as a reason in law or fact why the Plaintiff should not recover or establish what he seeks". The defendant did not bring an action or sue to rescind.

§1635(f) may fix the time to raise §1635 as an action but the Defendant's right of recoupment is not an action. §1635(f)'s 3 years cannot be an indispensable condition of rescission liability and the rescission action according to this Court's definition of recoupment. §1635(f) fixes 3 years for an action so a defense by recoupment does not meet the definition of a statute of repose.

Beach relied on an incomplete legislative history of §1635(f) in 1980 compared to §1640(e) thereby creating conflict with another line of Federal opinions. This Court's statutory construction rules for a particular statutory provision requires examination of the whole statute's legislative history, its design as a whole and its object and policy. Helvering v. New York Trust, 54 S.Ct. 806,808-809, 292 U.S. 455, 78 L.Ed. 1361(1934), Crandon v. U.S. 110 S.Ct. 997, 494 U.S. 152, 108 L.Ed2. 132(1992). Beach examined §1635(f) and §1640(e) in 1980, ignoring their history from 1968 to 1995, and so conflicts with Helvering and Crandon.

Beach ignored the complete history of §1635(f) and the purpose of the 1974 Act, citing Russello v. United States 104 S.Ct. 296, 464 U.S.16, 78 L.Ed2 17 (1983) to hold when Congress puts language in one section of a statute and omits it from another section it is generally presumed Congress acts intentionally. Russello p.299 interpreted 18 U.S.C.1962 & 1963 [RICO]. Congress passed RICO as a

comprehensive statute in 1970 and did not amend either sections by 1983 when this Court wrote Russello. Since Congress did not amend the sections before Russello, the general presumption had validity for interpreting RICO at one point in time.

Beach's general presumption holding has no basis for §1635(f) and §1640(e) because Congress passed §1640[1968] with no recoupment and a 1 year limit and §1635[1968] with no limit. Congress amended each section piecemeal at different times to correct different problems, making Russello inapposite. This Court does not look at one section of a statute in one point of time to presume Congress' intent under TIL's circumstances. This Court examines the history and purpose of each section as a whole to glean Congress' intent. Beach conflicts with Helvering, and Crandon when it relies on Russello to interpret §1635(f) and §1640(e) based on 1980 only.

The complete legislative history from 1968 supports post-limit recoupment. Beach only looked at 1980 §1635(f) because Beach could not justify its opinion based on the complete history of §1635(f) and §1640(e) from 1968 to 1995. Comparing §1635(f) to §1640(e) based only on 1980 and concluding Congress limited the right to rescind to 3 years as held by Beach is like reading Shakespeare's Romeo and Juliet Act IV Scene V and concluding Juliet died from poisoning.

Congress imposed a 1 year limit for damages in §1640(e)[1968]. and did not expressly allow post-limit damages. §1635[1968] had no time limit and so did not need a post-limit recoupment provision. Since Congress originally passed an unlimited right to rescind in

1968, Congress examined and accepted the results of rescission on a creditor after 3 years in 1968. Congress allowed consumers to rescind on default after 359 payments on a 360 month mortgage and note despite the result to the creditor or the potential for a consumer to remit 359 payments, then strategically default.

Congress passed the first TILA amendment to rescission in 1974 to deal with Sosa, and similar cases that allowed rescission after a sale because the Sosa cases created title problems. A §1635(b) rescission reordered common law rescission when it returned the parties to the status quo. The creditor cancels the mortgage and returns charges to the consumer. The consumer then returns the principal. Williams v. Homestake Mortgage Co., 968 F.2d 1137,1140-1142 (11th Cir.1992). The parties can never return to the status quo, especially if a consumer refinances the old debt with the same lender and then the consumer sells the home, see for example In Re Porter 961 F.2d 1066 (3rd Cir.1992). The status quo requires the creditor to get his old mortgage back, an impossibility if the consumer sold the home to a new buyer who put a new mortgage on the same property.

Responding to a now obvious title problem, 2 Congressional reports recommended a limit on rescission for the sole purpose to clear property title. The January 3, 1972 Annual Report to Congress on TIL by the Board of Governors of the Federal Reserve System, and December 1972 Report of the National Commission on Consumer Finance proposed the rescission limit not to deal with the monetary result of rescission on lenders after 29 years 11 months nor to deal with

strategically defaulting consumers. Both were concerned only with title clouds after a sale. Neither report nor Congress cited any concern cited by Beach to justify an absolute 3 year limit: avoid a strategic default and the results on creditors. Congress passed the 3 year limit for the sole purpose to clear title to property:

> "As a result, the titles to many residential real estate properties may become clouded by uncertainty regarding these rights of rescission. The Board recommends that Congress amend the Act to provide a limitation on the time the right of rescission may run." January 3, 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System, p.19.
>
> "The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required disclosures have been made and notice of rescission provided. This clouds the title to many residential properties and injures consumers in the long run. **The Commission supports the recommendation of the Board of Governors of the Federal Reserve System that Congress amend the [TILA] to limit the time the right of rescission may run where the creditor has failed to give proper disclosures.** The period recommended by the FRB (three years or until the property is sold, whichever is shorter) appears reasonable." December 1972 Report of the National Commission on Consumer Finance, p. 189-190.

Since Congress passed the 3 year rescission limit to prevent title clouds, permitting defensive rescission after 3 years when the consumer still has title is consistent with TIL's purposes in general, rescission in particular, and the 1974 amendment; when the consumer still owns title, no title cloud exists for post 3 year rescission. Rescission can still protect consumers and return the parties to the status quo before the lien consistent with TILA and rescission's stated purpose. Beach's treatment of §1635(f)[1974] as a statue of repose is inconsistent with its history.

Beach's holding that TIL rescission is a penalty and not an equitable right to remedy wrong disclosure conflicts with Williams,

p.1140, which points out Congress adopted but reordered common law rescission to remedy wrong disclosure. Williams p.1140-1142 cited TIL cases that equitably apply §1635 and held New TIL adopted TILA rescission as an equitable remedy not a penalty. see also FDIC v Hughes Development, 684 F.Supp. 616, 622-623 (D.Minn. 1988).

TILA rescission as an equitable remedy, and not a penalty is consistent with the purpose of disclosure. Porter p.1074 states TIL rescission gives consumers time outside closing to weigh the credit terms and think about risking their homes to foreclosure based on the terms disclosed. It is equitable to rescind when creditors give wrong disclosures. Consumers could not evaluate whether to expose their homes to foreclosure and loss based on the correct terms because the creditor never gave them the correct terms. Conversely, creditors should not have a loan secured by a mortgage and force the consumer to pay or lose his home based on terms the consumer did not know or agree to when the creditor violated TIL with wrong and inaccurate disclosure of the loan's terms or the right to rescind before closing on the loan.

It is even more equitable to allow consumers to rescind in light of the TILA rescission remedy, especially when the consumer still has title. TILA rescission returns the parties to the status quo before the closing occurs. The consumer gets back his costs and the creditor gets back his principal. Consumers are not saddled with a mortgage and credit terms that he never agreed to. They can renew their credit search to find the best terms available. Even though the creditor cannot collect any charges from the consumers,

creditors will still get back the original principal despite TIL errors. Creditors suffer adverse consequences only if they wrongly refuse to timely rescind.

§1635 rescission after 3 years is consistent with Congress' express purpose and equitable for both parties, especially when the consumer is faced with a foreclosure and the lose of his home: 1.) The consumer will not lose his home based on terms the consumer thought he had, but did not, because the creditor never clearly and conspicuously disclosed the correct terms under TILA; 2.) Consumers get back only the charges imposed by the creditor; 3.) Creditors get back all the principal originally lent to the consumer; 4.) The creditor will be encouraged to discontinue his loan practices that led to the extended right to rescind. Porter,p.1074 Williams,1140-1142, Hughes,p.622-623, Dawe, and Reiter.

Beach ignored the legislative history of §1640(e). Congress overruled as wrongly decided the Devlin v. Aetna Finance Co. 379 So.2d 972 (Fla. 5 DCA 1979),cert.den.389 So.2d 1108 (Fla.1980) line of cases that refused to allow recoupment for damages. §1640(e)'s 1980 amendment allowed post-limit §1640 damages defensively and rejected the statutory right/statute of repose reasoning that the Devlin cases used to bar damages after 1 year. Congress disclaimed any intent to adopt the statutory right/statute of repose doctrine for TIL cases in 1980.

The courts that originally disallowed post-limit §1640 damages used Beach's analysis based on the artificial distinction between a common law right, a statute of limitation and a statute creating

a new substantive right, [the "statutorily created right" doctrine rejected by James]. see for example Ken Lu Enterprises v. Neal, 223 S.E.2d 831,833-835 (App.N. C.1976),cert.den. 225 S.E.2d 829 (N.C. 1976), cert.den.97 S.Ct. 533, 429 U.S. 1002(1976), Heulett v. John Blue, 344 So.2d 505,507-508 (App.Ala.1976), Public Loan v. Hyde, 390 N.Y.S. 2d 971, 973-974 (1977), Devlin.

Devlin, p.973, noted the split and followed the cases that did not allow defensive time barred damage claims. Congress adopted the cases allowing post-limit defensive damages that James and the Dawe cases adopted and rejected Devlin. Congress disapproved of Devlin and the statutory right/statute of repose doctrine for TIL in 1980 and therefore disapproved of Beach's opinion.

The history of §1640(e) as amended in 1980 shows Congress did not address defensive damage claims in 1974. The 2 1974 reports to Congress and 1974 Congress did not address post-limit damages because no post-limit damage cases existed in 1974. Congress did not need to fix a TIL problem that did not exist in 1974. Congress adopted the reports at §1635(f) in 1974 only to prevent clouds on title as a technical adjustment to the 1968 Act. see James,p.729.

§1640(e) had no recoupment provision and the case law split after 1974 over whether damages were a right created by statute and ended when the statute expired, or survived by recoupment. Congress dealt with the split by rejecting the Devlin cases and allowing defensive damage claims in 1980, thus adopting James and killing Beach's statutorily created right doctrine for TILA. Congress did not address defensive rescission in 1980, but Beach overlooked the

fact Congress did not need to add post limit defensive rescission in 1980, just as they had no need to add the right to defensive damages in 1974: no split of cases in 1974 or 1980 existed when Congress amended the statute.

Congress did not show an intent to bar post-limit defensive rescission in 1980. Congress treated post-limit rescission in 1980 in the same way they treated post-limit damages in 1974. Congress simply did not address a non-existent problem. Congress did not need to resolve a split of authority on damages in 1974 when they added §1635(f) and did not need to resolve a split of authority on rescission in 1980 when they added §1640(e) to allow post-limit damages defensively. see Ablin. Beach overlooked this legislative history, then borrowed the reasoning James and Congress rejected, using the now completely discredited statutorily created right statute of repose doctrine to support its opinion.

Congress reconciled the statutorily created right doctrine for §1640(e) damage cases by rejecting Devlin and allowing not barring claims in 1980. James rejected the same creditor attempts to apply the Devlin cases to rescission. Smith in 1984, Dawe p.800 in 1984 and Ablin in 1988 p.381-382 looked at the same pre-1980 1640(e) damage cases Devlin p.973 cited. All rejected Devlin, and used the reasoning in the cases Congress approved of in 1980 when it passed §1640(e) and rejected Devlin.

Reiter, p.1218, Smith p.1553, and Coxson p.193-194 all reject the statutorily created right/statute of repose doctrine as dead. James in 1980, Smith and Dawe in 1984, and Ablin in 1988 looked at

the pre-1980 damage cases and correctly reasoned Congress killed the doctrine in 1980 for TIL cases. James, Smith and the Dawe cases embraced the opinions Congress embraced in 1980 when Congress ended all debate on the subject by rejecting the statutory created right and statute of repose doctrine that Beach has now resurrected.

Beach thought rescission inequitable after 3 years, holding it is unfair to allow a strategic default, offset principal by past collected interest, loss of post-default accrued interest, and pay the consumer's costs and fees. The holding has a number of flaws, notwithstanding the fact that Rudisell, p.248 already considered and rejected a similar creditor argument, presenting yet another Federal Circuit opinion in conflict with Beach.

The legislative history of §1635 shows Congress did not worry about the monetary result of a post 3 year rescission on a creditor by strategic default when they passed §1635 in 1968 and cited no such concern over strategic defaults when they passed §1635(f). The 3 years in 1974 only protected title clouds, not creditors from the monetary results of rescission after 3 years. 1968 Congress already approved post 3 year rescission despite the potential for strategic defaults and the result on a creditor and approved the result again in 1974 as long as the result would not pose a title problem.

Beach's expressed concern over consumers who may strategically default after 3 years has no basis in the legislative history. If Congress had such a concern, it could have created protection from an intentionally defaulting consumer. Congress could easily create a rescission exception to protect creditors from strategic defaults

but did not do so. Beach p.73 holds it is presumed Congress acted intentionally to omit any creditor protection from consumers who strategically default after 3 years.

GW may argue Congress did not need to protect lenders from a strategic default because it did not allow §1635(f) after 3 years. However, a consumer could strategically default before 3 years by remitting 35 payments, sending out a notice to rescind, and then defaulting. Congress did not protect creditors from intentional defaults and so declined to protect creditors from Beach's fear of strategic intentional defaults.

Dawe balanced the equities for consumers and ruled Congress wants a consumer to defend foreclosure by rescission rather than encourage creditors to avoid TILA liability by waiting more than 3 years to sue. Allowing creditors to profit from TILA errors because 3 years passed would not further TIL's purposes. The Dawe cases and Reiter cases reject Beach's concern for consumer windfalls when a consumer in default can rescind strategically after many years. The Dawe cases articulated Congress' concern: inequity to consumers not creditors and furthering Congress' purpose to protect consumers. Given TILA's remedial purpose, equities protect consumers from foreclosure based on wrong terms rather than protect creditors from TILA errors after 3 years.

Creditors protect themselves by giving accurate disclosures and putting in place procedures to catch and correct errors as required by §1640(c). Creditors protect themselves when they discover errors after closing by informing consumers of the error,

giving corrected disclosures and adjusting the account under §1640(b). Liability under §1635 after 3 years furthers Congress' purpose to encourage accurate disclosure and protect consumers by forcing creditors to: give correct initial disclosures; set up §1640(c) procedures to catch and correct errors; examine loans post-closing for accurate disclosure; follow §1640(b) after finding violations. This furthers compliance, allows consumers to make informed credit decisions and protects consumers. Shielding creditors from liability frustrates TIL's purpose and encourages creditors to avoid correcting errors under §1640(b) by holding mortgages in default past 3 years then suing to foreclose.

Beach could not dispute this legislative history of rescission and damages through 1974. Allowing post 3 year rescission furthers Congress' purpose to protect consumers, encourage creditors to give accurate disclosure, establish §1640(c) procedures to examine loans for accurate TIL disclosures, and implement a procedure to follow §1640(b) after finding violations, fostering compliance, informed consumer credit decisions, and ultimately protecting consumers.

Shielding creditors after 3 years frustrates TIL's purpose, and encourages creditors to avoid correcting errors under §1640(b) after finding errors by holding loans for 3 years, then suing on default. Creditors will advertise deceptively low APRs and FCs. Consumers will borrow from violative creditors who understate APRs and FCs. Creditors will have no incentive to establish procedures to correct errors under §1640(c). Compliant creditors could not compete with non-compliant creditors because his loan would be more

expensive, leading to TIL misdisclosure, misinformation about true costs of credit and frustrating TILA's stated purpose. see Dawe, Ablin, McClammey.

Beach encourages lenders to close their eyes to post-closing errors and violate §1640(b). A lawyer who properly represents the creditor and reviews a defaulted loan for foreclosure in month 32 will examine the loan for a TIL defense. When the lawyer discovers a rescission error and advises the creditor to follow §1640(b) the creditor will ask what happens if he complies with TIL. The lawyer must tell the creditor the consumer will probably rescind the loan when the creditor adjusts his account and sends the corrected TIL disclosure statement and new right to rescind. see §1640(b), In Re Underwood, 66 B.R. 656,662-663 (Bkr. W.D. Va. 1986).

When the creditor asks what happens if he does not comply with §1640(b) or does not foreclose the lawyer would have to advise the creditor that if he did not comply with §1640(b) and did not file a foreclosure until month 37, the consumer could never rescind. Virtually no lender with a TIL violative loan will sue to foreclose until after 36 months to take advantage of Beach and avoid a §1635 rescission, eviscerating §1640(b) and the §1635 right to rescind.

Beach encourages creditors to grossly understate FC's and APRs because they can close more loans and avoid rescission. Consumers who received DSs with grossly understated finance charges would borrow from violative creditors who seemingly offer lower costs of credit. The consumer who closes then finds he could not afford to pay the loan and defaults will find the violative creditor will not

foreclose right away. The consumer will not need to find a lawyer to defend an unfiled foreclosure and will likely never find out about the right to rescind until after 3 years runs.

The violative creditor will hold the defaulted loan until more than 3 years from closing to avoid the consequences of §§1635 and 1640(b), then sue to rescind, avoiding a valid TIL rescission and the consequences of TIL violations. Compliant creditors could not compete with non-compliant creditors because compliant creditors would seem to offer more expensive loans. Beach encourages TIL violations, misinformation about true costs of credit, and ultimately frustrates TILA's stated purpose. This is why the Court must grant certiorari.

CONCLUSION

The Beaches respectfully submit Certiorari should be granted to resolve the express and direct conflict between the Florida Supreme Court's decision that pays homage to the statutory created right and statute of repose doctrine for recoupment. When creditors violate the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, this Court should treat the federally created right identical to all other federally created rights. The defendant can raise his statutorily created right as a defense to the suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort. This Court should affirm its long standing rule that refuses to reward Plaintiffs and make them responsible for the consequences of their wrongdoing by allowing defendants to defend by time barred claims, and put to an end the statutorily created right, statute of repose, statute of limitation dichotomy for federal claims.

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